United Nations A/CN.9/598/Add.1

General Assembly

Distr.: General
19 April 2006

Original: English

United Nations Commission on International Trade Law
Thirty-ninth session
New York, 19 June-7 July 2006

Legislative work of international organizations relating to public procurement

Note by Secretariat

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V.06-53113 (E) 020506 030506

I. Introduction

1. This note sets out a summary of legislative work of international organizations relating to public procurement undertaken or planned to be undertaken in the past year or planned to be undertaken in the near future.[1] The note is not intended to be exhaustive but rather focuses on the work of the organizations that may have implications on the work of UNCITRAL Working Group I (Procurement) (the "UNCITRAL Working Group" or the "Working Group").

2. On the basis of the information provided in the present note, the Commission and/or the Working Group may wish to consider where the current work of the Working Group on the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "Model Law") (A/49/17 and Corr.1, annex I) may complement the work done by other organizations, and to identify appropriate cooperation and coordination strategies. The Commission may also wish to guide the Working Group as to the issues that it should consider in addition to those on its agenda in connection with the current project, or separately in due course.

3. The legislative work of the following organizations is described in this paper on the basis of publicly available materials and information received by the UNCITRAL secretariat from these organizations in response to its inquiries:

ADB	Asian Development Bank
AfDB	African Development Bank
APEC	Asia Pacific Economic Cooperation
COMESA	Common Market for Eastern and Southern Africa
EBRD	European Bank for Reconstruction and Development
EC	European Commission
IADB	Inter-American Development Bank
IAPSO	Inter-Agency Procurement Services Office
ITC	International Trade Centre
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
UNCTAD	United Nations Conference on Trade and Development
UNDG	United Nations Development Group
UNDP	United Nations Development Programme
UNODC	United Nations on Drugs and Crime
WAEMU	West African Economic and Monetary Union
the World Bank	
WTO	World Trade Organization

4. The note complements a note by the Secretariat on current activities of international organizations related to the harmonization and unification of international trade law, contained in A/CN.9/598.

II. Summary of legislative work of international organizations relating to public procurement

A. Procurement in general and electronic procurement

1. World Trade Organization

5. The WTO activities in public procurement are currently in two main areas:[2] (i) the WTO working party on GATS rules continues negotiations on government procurement in services under GATS article XIII; and (ii) within the WTO Committee on Government Procurement that administer a plurilateral Government Procurement Agreement (the "GPA"), negotiations are underway with a view to improving the GPA, achieving the greatest possible extension of its coverage among all WTO parties and eliminating any remaining discriminatory measures and practices, as called for under article XXIV: 7 (b) and (c) of the GPA.

6. The most recent negotiations on government procurement in services under GATS article XIII in 2005 evolved around a proposal on the structure of an annex to the GATS on procedural rules for government procurement of services. Issues raised during the negotiations included the relationship to the GPA, the possibility of distinguishing between goods and services, thresholds and elements of procedural rules.[3]

7. As regards the second area, in a note by the Secretariat entitled "Current activities of international organizations related to the harmonization and unification of international trade law" (A/CN.9/584, para. 55) that was before the Commission at its thirty-eighth session, in 2005 (the "2005 Secretariat Note"), the Commission's attention was drawn to the current renegotiation of the GPA. While little information about the stage and extent of renegotiation is publicly available as the negotiations are held in informal meetings, it has been made known that the negotiations focus on the simplification and improvement of non-market-access-related provisions of the GPA, and during 2005, the Committee made substantial progress on the revision of these provisions. In addition, informal discussions have also been held on the so-called "horizontal" coverage matters as well as on various drafting proposals relating to market-access-related provisions.[4] The target date for the overall conclusion of the negotiations pursuant to article XXIV:7 was set for the end of 2006.[5]

8. At the sessions of the Working Group, several UNCITRAL member States emphasized the importance of coordinating the approaches to drafting of any revised or new provisions in the Model Law and the Guide with the approaches on the same subjects taken in WTO. To this end, the Secretariat invited WTO representatives to the sessions of the Working Group and representatives have attended a majority of the sessions to date. In addition, informal consultations have been held between the Secretariat and WTO representatives. However, the confidentiality of the GPA renegotiation may limit the effectiveness of such measures.

9. The Commission may wish to appeal to WTO directly and/or through UNCITRAL member States that participate in the relevant WTO negotiation processes to improve coordination of the work in the relevant WTO bodies with the related work of the Working Group so that to ensure that revisions to the UNCITRAL Model Law and the Guide take into account relevant developments in the WTO.

2. Multilateral development banks (MDBs)

10. In the 2005 Secretariat Note, the Commission's attention was also drawn to the activities of a joint working group on Harmonization of Electronic Government Procurement (e-GP) (the "joint Working Group"), set up at the beginning of 2003 by the ADB, the IADB, and the World Bank, and subsequently joined by the AfDB, EBRD and Nordic Development Fund. (See A/CN.9/584, para. 50).

11. Since its establishment, the joint Working Group has issued two sets of requirements that have to be met in borrowing countries where e-GP systems are used for procurement under MDB financed projects: the E-Tendering Requirements (October 2005) and the E-reverse Auction Guidelines (December 2005) (analysed in paras. 14 to 20 below).[6] These requirements supplement and do not replace the existing requirements that apply to traditional procurement processes for MDB funded activities. The preparation of another set of requirements, for electronic purchasing, is pending.[7]

12. The joint Working Group also sponsored the preparation of the Guide for Legislators and Managers on Authentication and Digital Signatures in E-Law and Security (December 2004) and the Guide on Buyer-Supplier Activation (October 2005) as well as a number of papers on more general issues of e-GP intended to guide countries of MDBs' operation in assessing their readiness for e-GP and in the implementation of different e-GP stages.[8] A common disclaimer accompanies the Guides and the papers stating that the views expressed therein do not represent the official position of the MDBs and the MDBs do not guarantee the accuracy of the included information and do not accept any responsibility for any use thereof.

13. The documents were prepared in response to an increasing trend in borrowing countries to use electronic procurement systems and means for processing and managing MDB funded activities. The general position under these papers is that e-GP domestic rules in borrowing countries should be developed in a technologically neutral manner, to accommodate the pace of changes in technology. The documents are also formulated on the basis of a phased approach to the implementation of e-GP, i.e., electronic means can be used for selected steps in the procurement process, adding more steps to the system as resources, legislation or developments permit.

E-Tendering Requirements for MDB Financed Procurement

14. As stated in the introductory remarks to this document, the requirements do not intend to establish a standard path in the development and implementation of e-GP, rather the MDBs encourage individual governments to find their own path. Nevertheless, as stated further in the introductory remarks, to ensure that the basic principles of good governance, such as transparency, non-discrimination, equality of access, open competition, accountability and security of process, are observed, the requirements provide for standards and qualities that have to be met if e-GP systems

are to be used for procurement of goods, works, services or consulting services under MDB financed projects. Domestic e-GP systems' features, standards and operations in borrowing countries are thus to be evaluated for their compliance with the E-Tendering Requirements.

15. The E-Tendering Requirements, as stated therein, were formulated with the consideration in particular of costs and ease of participation in e-GP and importance of preserving good audit trails. They are grouped into the following 12 sections (providing inter alia for):

Section 1—System access (open, equal and unrestricted access with technical standards for interoperability, reliability and security);

Section 2—Advertising (publication in various media with no material difference between them; measuring the bidding period from the date of publication whichever is later; and online publication on a publicly-accessible website that is well-known nationally, well maintained, functional and affords free and unrestricted access);

Section 3—Correspondence, amendments, substitutions and clarifications (a possibility of making them electronically so long as print correspondence is used for bidders who request it);

Section 4—Bidding documents (non-advisability of splitting documents into combination of electronic and paper portions);

Section 5—Submission of bids/proposals (both paper and electronic form);

Section 6—Bid securities (general discouragement of their use in e-GP);

Section 7—Public bid opening (physical presence of bidders and simultaneous posting information that was read out onto a web site);

Section 8—Bid evaluation and contract award (the use of pre-approved automated evaluation systems subject to compliance with evaluation criteria, principles of economy, efficiency, equal opportunity and transparency and other requirements, and which result in contract award to the lowest-evaluated, responsive bidder);

Section 9—Information security management (its conformation with international standards and taking into account recognized best practices);

Section 10—Authentication (legal recognition and acceptance of digital certification/signatures issued in a bidder's country and other measures to ease participation by non-domestic suppliers);

Section 11—Charges for the participation in e-GP systems (participation generally free of charge); and

Section 12—Other conditions (application of the E-Tendering Requirements to third-party service providers who with their subsidiaries or parent companies, for avoidance of a possible organizational conflict of interest, are not eligible for award of contracts procured through the e-GP systems operated by them).

16. All issues addressed in sections 1 through 9 and 11 of the E-Tendering Requirements are being considered by the UNCITRAL Working Group. As regards authentication (section 10), the UNCITRAL Working Group agreed not to deal with

the issues of authentication in the Model Law but rather to discuss it in the Guide to Enactment with appropriate references to the applicable UNCITRAL instruments and regulatory framework that has to exist in the State enacting the revised Model Law.[9] As regards the issue of third-party service providers and possible organizational conflict of interests, addressed in section 12 of the E-Tendering Requirements, the issue has been raised in the Working Group[10] but has not been included as a separate topic on the Working Group's agenda. Nevertheless, the Working Group is expected to take it up in connection with its consideration of procurement methods and techniques where the risk of conflict of interests is particularly high, such as in the context of electronic reverse auctions and framework agreements.

E-Reverse Auction Guidelines for MDB Financed Procurement

17. The E-Reverse Auction Guidelines draw significantly on the E-Tendering Requirements. The guidelines are grouped into the following 11 sections: (i) system preparation; (ii) bidding specifications; (iii) advertising; (iv) operation; (v) correspondence, amendments and clarifications; (vi) access; (vii) bid securities; (viii) bid evaluation and contract award; (ix) information security management; (x) authentication; and (xi) other conditions. The requirements in sections (iii), (v), (vi) (except for the provisions establishing specific pre-qualification procedures in the electronic reverse auction (ERA) context), (vii), and (ix) through (xi) mostly repeat those contained in the E-Tendering Requirements, with some amendments to adapt them to ERAs. The ERA-specific requirements are found mainly in the following sections (establishing inter alia):

Section 1—System preparation (see para. 19 below);

Section 2—Bidding specifications (details about ERAs that have to be published with the bidding specifications);

Section 4—Operation (conditions that have to be met in the course of the running of auctions, including anonymity, confidentiality, automatic re-ranking of bidders, and content and extent of communication of information to bidders, and for closure of the auction);

Section 6—Access, in the provisions establishing special procedures to be followed if ERAs are preceded by pre-qualification (that ERAs must not be used if pre-qualification has reduced the number of bidders to a level that materially affects competition and under no circumstances when there will be less than three independent bidders); and

Section 8—Bid evaluation and contract award (that an ERA award must be based solely on prices where the contract is awarded at the lowest price to the corresponding qualified bidder; that contract awards should immediately be published online, together with the winner and the awarded price; and that there should not be any negotiation during or after the ERA process is closed).

18. Unlike the E-Tendering Requirements, the E-Reverse Auction Guidelines do not apply to the procurement of consulting services. The Guidelines' introductory remarks regarding general conditions for the use of ERAs state that "[n]ot all procurement is suitable for e-reverse auction. Such methods should deal only with contracts for which the specifications can be determined with precision, where price

is the only determinant and where there exist significant numbers of potential bidders. It must also be possible to transparently establish the respective ranking of the bidders at any stage of the electronic auction. Those aspects of the bids which imply an assessment of non-quantifiable elements should not be the object of electronic auctions. Care must also be taken not to apply such methods in markets where they may be especially vulnerable to market manipulation or anti-competitive behaviour such as collusion. Markets with only a limited number of independent qualified bidders, or markets dominated by one or two major players will be especially vulnerable to this danger."

19. This general statement is transposed to the concrete conditions for the use of ERAs contained in the "system preparation" section, which in particular require:

(a) Precise specifications of the procurement and suitability of the purchase matter and requirements for simple bidding processes where evaluation is solely in terms of price;

(b) Clear establishment and advertisement of the auction scope and the evaluation criteria for selection and award of a contract, sufficiently high purchase value to make it commercially viable for a competitive supplier base, but not so high as to materially reduce competition;

(c) Verification that all operational conditions for starting the auction have been met;

(g) Good intelligence on past transactions in the market place and market structure to monitor and prevent possible market manipulation, predatory pricing or collusion; and

(e) That ERAs be used only for purchases below the relevant international competitive bidding threshold, only for procurement processes where price is the sole determining factor (which is generally for goods only) and not be used where such use conflicts with the principle of open competition by locking out significant numbers of otherwise eligible bidders who do not have access to the required technology.

20. Consequently, the Guidelines prefer to treat ERAs as a special case of e-purchasing, rather than e-bidding, explaining this preference by the fact that ERAs are suitable for simple well-defined purchases where the determining factor is price or quantity and where a considered evaluation process, common in e-bidding, is not required. The Guidelines also, with the reference to the discussions in the UNCITRAL Working Group, adopted the approach of treating ERAs as a procurement method in itself, rather than an optional phase in other procurement methods.

21. The ERA-specific issues addressed in the Guidelines are being considered by the Working Group, including conditions for the use of ERAs and award criteria, which would in turn identify types of procurement (goods, works and types of services) suitable for ERAs and determine whether ERAs will be treated as a procurement method in itself or an optional phase in other procurement methods. The Commission, at its thirty-ninth session, will have the reports of the Working Group on its eighth and ninth sessions (A/CN.9/590 and A/CN.9/595, respectively) that contain a summary of the Working Group's consideration of these issues.

22. For other related joint activities of the MDBs, see sections B and C below.

3. Africa

African Development Bank

23. The AfDB is currently revising its Rules of Procedure for Procurement of Goods and Works and for the Use of Consultants, to harmonize them with those of other MDBs. It is also involved, in particular through country procurement assessment reports and by providing support to subregional organizations, such as COMESA and WAEMU (see paras. 24 to 28 below), in various legislative initiatives on harmonization and modernization of public procurement systems at national, sub-regional and regional levels.

Common Market for Eastern and Southern Africa

24. In the 2005 Secretariat Note, the Commission's attention was also drawn to the work by the COMESA secretariat on the implementation, with support from the AfDB, of the COMESA Public Procurement Reform Project (PPRP) (A/CN.9/584, para. 51). The PPRP programmed activities for the period until December 2004 were completed, in particular with the launch of the Internet-based Procurement Information System (CPIS)[11] and the development of the guidelines for the implementation of the 2003 COMESA public procurement Directive.[12, 13]

25. A successor project, the Enhancing Procurement Reforms and Capacity Project (EPRCP)[14] intends to fill gaps between the expected and achieved objectives under the PPRP.[15] It, among others, envisages in the long run the development and signing of a regional procurement agreement that would provide national treatment for suppliers coming from COMESA member States and establish thresholds for each procurement category, above which contracts would have to be procured through regional procurement mechanisms. More focused attention is proposed to be given to the development of e-procurement: the EPRCP envisages upgrading the CPIS, as a platform for regional modern public procurement system, which is expected to deliver a range of more advanced procurement services, beyond the mere publicising of procurement information, such as enabling on-line submission of tenders.

26. The Working Group has established close relations with COMESA, which is regularly represented at the Working Group's sessions.[16] In addition, the UNCITRAL secretariat cooperates with the COMESA secretariat on various issues related to legislative and technical assistance work.

West African Economic and Monetary Union

27. In the 2005 Secretariat Note, the Commission's attention was also drawn to the WAEMU programme of modernization and reform in public procurement, comprising two phases: (i) establishing the tools necessary for the reforms, and (ii) implementing them (A/CN.9/584, para. 51).

28. The first phase was finalised, with the adoption, by the WAEMU Council of Ministers, in December 2005, of the WAEMU Public Procurement Directives, including Local Government Regulations. The second phase covers capacity building at the level of the WAEMU Commission (to enable it to fully play its role

in dissemination and control of the implementation of the Directives), and assistance to WAEMU member States in the effective application of the Directives at the national level.

4. Asia

Asia Pacific Economic Cooperation

29. The APEC Government Procurement Expert Group (GPEG)[17] is revising the APEC non-binding Principles on Government Procurement,[18] in particular to incorporate the APEC Transparency Standards on Government Procurement[19] and to minimize duplication among various non-binding Principles. The GPEG is also considering expanding the wording of the non-binding Principles on non-discrimination to reinforce their application as regards non-discrimination on the basis of gender. The revised draft of the non-binding Principles was due for consideration at the session of the APEC Committee on Trade and Investment in late May 2006. The GPEG also agreed to develop the initiative on assistance to small and medium enterprises (SMEs) through government procurement.

30. The content of the APEC non-binding Principles is being brought to the attention of the Working Group as and when they are relevant to the work of the Working Group. The Secretariat intends to continue doing so taking into account any revisions to the non-binding Principles that may be adopted within the APEC in the near future. For the subject of SMEs' participation in the public procurement, see further paragraphs 40 and 41 below.

Asian Development Bank

31. On 6 February 2006, ADB's Board of Directors approved the new Procurement Guidelines and Guidelines on the Use of Consultants. Both became effective on 1 April 2006.[20]

5. European Commission

32. During the period under review, the EC issued a number of documents amending, supplementing and implementing the new European Union (EU) procurement Directives 2004/17/EC and 2004/18/EC (the "Directives"). The amendments to the Directives contained in directive 2005/51/EC of 7 September 2005 concern provisions on the format of publication of procurement-related notices, contained in the annexes to the Directives.[21] In the light of new standard forms for publication of notices to be established in implementing measures, the references in the annexes to the old format established by directive 2001/78/EC were deleted.

33. The new standard forms were established by Commission Regulation (EC) No. 1564/2005 of 7 September 2005, which became binding for the use in all EU member States from 1 February 2006.[22] As was noted in the press release,[23] the adoption of the new standard forms is seen as a part of a wider EU strategy on computerising public procurement procedures in the EU.[24] The new forms follow the same structure as the ones in directive 2001/78/EC but were streamlined and simplified, taking into account elements introduced by the Directives, such as framework agreements, electronic reverse auctions and dynamic purchasing systems. The greatest advantage of the new form comes with online use: publication

time in such case is shortened from 12 to 5 days and the time limits for the receipt of tenders or requests to participate can consequently be shortened by 7 days.[25]

34. The conditions and rules for the use of the new standard forms are explained in the EC interpretative document, the Commission Staff Working Document on Requirements for Conducting Public Procurement Using Electronic Means under the Directives,[26] issued in July 2005 to facilitate the task of EU member States of transposing the Directives to their national systems. The document analyses the rules applicable to online communications and covers all stages of the contract award procedures that can be computerized. It also explains rules applicable to the new elements and purchase techniques of the Directives, such as framework agreements, electronic reverse auctions and dynamic purchasing systems.

35. The EC has also recently issued the following documents: (i) the detailed rules for the application of the procedure provided for in article 30 of Directive 2004/17/EC (Commission decision 2005/15/EC of 7 January 2005); (ii) the note explaining the regime laid down by Directive 2004/18/EC for competitive dialogue; (iii) the note explaining the regime laid down by Directive 2004/18/EC for framework agreements;[27] (iv) the note explaining the scope of "exclusive or special rights" within the meaning of Directive 2004/17/EC; and (v) the note explaining "contracts involving more than one activity" under Directive 2004/17/EC.[28]

36. Its upcoming legislative initiatives include: (i) elaborating proposals to amend the directives defining specific requirements for remedies systems in the area of public procurement (directives 89/665/EC and 92/13/EC) in order to clarify and improve the efficiency of existing provisions; (ii) possible adoption by the end of 2006 of a communication on contracts outside the scope of the Directives, to explain and clarify how the principles of EU law should be applied to such types of contracts; (iii) adoption in the coming months of a directive modifying annexes to the Directives, to update the list of contracting entities/authorities following the last enlargement process; and (iv) the preparation of an updated version of the "Common Procurement Vocabulary" (CPV).[29]

37. The Working Group has established close relations with the EC, which is regularly represented at the Working Group's sessions. In addition, the UNCITRAL secretariat is regularly in touch with the EC procurement experts regarding the EC treatment of various issues being considered by the Working Group. The results of consultation are subsequently reflected in notes by the Secretariat or oral reports to the Working Group. The EU legislative developments in the procurement field are also regularly brought to the attention of the Working Group by the EU member States participating at the Working Group's sessions.

6. Latin America

38. The responses to the Secretariat's enquiries indicate that there are currently no procurement-related legislative activities being undertaken by any of the Latin American regional or subregional organizations, and there is little work towards harmonizing procurement-related legislation on sub-regional and regional levels. Reforms or updates of procurement legislation and to some degree its harmonization in the region take place on a country-by-country basis mainly through the country procurement assessment reports (CPARs) within the auspices of the World Bank and IADB. The CPARs' recommendations for improvement and action plans usually include proposals for legislative reform.

39. The Secretariat has been informed that the CPARs' proposals for legislative reforms in the region rarely mention the Model Law as a standard to be considered. The Model Law is not much known and used when the national procurement-related legal reforms are being implemented. To improve the current situation with the limited awareness and use of the Model Law in Latin America and the Caribbean, the Commission may wish to appeal to its member States concerned and observers, in particular the MDBs active in the region, to seek active dissemination in the region of knowledge about the Model Law in its current form and the Working Group's work on its revision so that they can be taken into account in legal reforms. The Commission may also wish to invite suggestions from its member States and observers for other cost-effective outreach actions that should be taken to this end in the region.

40. Limited legislative initiatives by some regional organizations have mainly evolved around e-GP and promotion of participation in public procurement by SMEs in response to the high interest in the countries of the region in these areas. In particular, the OAS Inter-American Agency for Cooperation and Development (IACD), as part of OAS efforts to increase transparency in public procurement and more effectively combat corruption, signed a series of agreements with governmental agencies from OAS member States that intended to promote e-GP and transfer the relevant appropriate technology. The first in the series of such agreements was signed between OAS/IACD and the government of Mexico. Subsequently, the agreements were concluded with Peru, Ecuador and Costa Rica and with other countries. However, the projects did not bring the expected results and were abandoned. The IACD was abolished and replaced by a new department whose latest initiatives involve, apart from the e-GP, assistance to national authorities with implementing legislative measures for the protection and development of SMEs through inter alia promoting their participation in public procurement by setting margins of preferences and set aside programs.

41. The subject of SMEs' participation in public procurement has not been envisaged for consideration as a separate topic by the Working Group. SMEs' interests have been considered by the Working Group in the context of e-GP in general and ERAs in particular and are expected to be further considered in connection with these and other topics, such as framework agreements, suppliers' lists and the use of procurement to promote industrial, environmental and other socio-economic policies.

B. Transparency and anti-corruption in procurement

42. Multilateral instruments and initiatives have been developed in recent years to enhance international cooperation in the fight against corruption and fraud, most of them with the references to the area of public procurement. The subsections below do not intend to provide exhaustive information on them but rather illustrate some most recent examples (see also para. 40 above).

1. International instruments: United Nations Convention against Corruption[30]

43. The United Nations Convention against Corruption, adopted by the General Assembly in October 2003, entered into force on 14 December 2005. A number of provisions of the Convention touch upon public procurement. Article 9 (1) of the Convention addresses public procurement specifically. Under the article, each State

Party to the Convention is required to take the necessary steps to establish appropriate systems of procurement based on transparency, competition and objective criteria in decision making that are effective, inter alia, in preventing corruption. The article further provides that such systems must address: (a) the public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders; (b) the establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication; (c) the use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures; (d) an effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established are not followed; and (e) where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

44. The Convention envisages mechanisms for its implementation through the Conference of States Parties to the Convention. The Conference is to be assisted by the secretariat, which has in particular to ensure necessary coordination with the secretariats of relevant regional and international organizations on the implementation of the Convention.

45. The UNCITRAL secretariat has been in contact with representatives of the Conference secretariat (UNODC has been designated as such),[31] regarding possible joint work to enhance the implementation of procurement-related provisions of the Convention, through legislative measures and technical assistance activities. As a first step, the UNCITRAL secretariat communicated to UNODC its analysis of the provisions of the Convention against the Model Law, pointing out that, although the only express corruption-related provision in the Model Law was in article 15, the Model Law by and large reflects the procurement-related provisions of the Convention. The analysis also pointed to some discrepancies, in particular that the requirements in article 9 (1)(e) of the Convention addressing conflicts of interest, screening procedures and training have no equivalent in the Model Law. The Secretariat intends to bring to the attention of the Working Group all the discrepancies between the Convention and the Model Law for its consideration in due course as part of its overall review of the Model Law.

2. Other initiatives

46. A number of international organizations, both governmental and non-governmental, touch upon various aspects of public procurement in their activities aimed at preventing corruption, fraud and other improprieties in the public sector. To name just a few, most multilateral donors have adopted specific anti-corruption policies to guide their development work, which in particular deal with procurement issues. Some donors are currently reviewing their development work policies to make them more effective in the fight against corruption, including in procurement.[32] Poverty reduction strategies formulated with participation of donors increasingly envisage measures to increase transparency and prevent corruption in procurement. International non-governmental organizations, active in the area of

anti-corruption, have also developed guidance documents and information resources aimed at preventing corruption in public procurement.[33]

47. A number of international organizations have launched internal management reforms, which inter alia include the revision of procurement regulations and rules to strengthen their provisions on transparency and make them more effective in the prevention of corruption, fraud and other improprieties.

48. At its sixth session (Vienna, 30 August-3 September 2004), the Working Group specifically considered the issue of the avoidance of fraud and corruption in public procurement and noted that, in its ongoing work, that issue would be one aspect to be taken into account when revising the Model Law and the Guide to Enactment.[34] Transparency in public procurement has subsequently been addressed in detail in the Working Group.

C. Procurement in the context of aid effectiveness

49. Connected to the activities described in the preceding section are the activities of international organizations aimed to increase aid effectiveness in recipient countries, in particular through the implementation of procurement reforms. The subsections below do not intend to provide exhaustive information on them but rather demonstrate major developments.

1. Developing diagnostics

50. The Paris Declaration on Aid Effectiveness of 2 March 2005[35] calls for the gradual alignment of donors' procurement rules, guidelines and practices with those existing in the recipient countries, provided that the latter comply with the internationally accepted standards.[36] To assess the compliance of the recipient countries' procurement systems with such standards and to monitor progress over time in improving country procurement systems, a number of donors and recipient countries, pursuant to their commitment under the Paris Declaration, are involved in the development of harmonised diagnostics and performance assessment frameworks.[37]

51. Within the auspices of the Working Party on Aid Effectiveness of OECD Development Assistance Committee (DAC), a Joint Venture on Procurement has been set up to oversee the implementation of the Paris Declaration as it relates to procurement and instigate activities to ensure progress towards the procurement-related targets. To this end, the Joint Venture builds its activities on the work undertaken by the World Bank-OECD/DAC Roundtable on Strengthening Procurement Capacities in Developing Countries (2003-2004), which inter alia resulted in development, endorsement of and commitment to implement an integrated set of Good Practice Papers on benchmarking, monitoring and evaluation, capacity development and mainstreaming procurement.[38]

52. The first meeting of the Joint Venture, attended by States, MDBs, UNDP/IAPSO, UNDG and other international and regional organizations and some national institutions, was held from 8 to 10 February 2006. The meeting accepted the Joint Venture's work plan for 2006-2008,[39] which envisages, among other things, development of a benchmarking tool and methodology for establishing

baselines and measuring progress against the Paris indicators/targets related to procurement. The meeting also considered a draft guide for assessment of procurement systems intended to be used as such a tool, to improve the consistency of assessments of national procurement systems and to facilitate measurements of compliance with benchmarks. The draft guide is based on the baseline indicators and sub-indicators proposed by the World Bank-OECD/DAC Roundtable (the "BLIs") (see the preceding paragraph). In the draft guide, further guidance is provided on BLIs and some BLIs are being refined to minimize risk of duplication and ambiguity and to fill in existing gaps.[40]

53. The next meeting of the Joint Venture, expected to be held in December 2006, should look at the revised version of the tool. The outstanding issues include formulation of clear definitions of "international standards", "recognized standards", and "internationally accepted good practices", and further refinement of the BLIs. Also, the establishment of associated performance indicators is proposed, as the BLIs per se are not indicative of the quality of any procurement system.

54. It has been recognized in the Joint Venture that a wider consultation with procurement stakeholders and countries are needed to ensure that the tool is accepted. In this regard, the Commission may wish to note the relevance of the work being done in the Joint Venture to the work of the Working Group, especially as regards international standards and good practices in the area of public procurement. The Commission may wish to express hope that in the course of the Joint Venture's work, including in any efforts to formulate definitions of "international standards", "recognized standards", and "internationally accepted good practices" in the area of public procurement, due account would be taken of the UNCITRAL Mode Law and the current work in the Working Group. In addition, the Commission may wish to note the relevance of the work being done in the Joint Venture also to the work of the technical assistance and coordination unit of the UNCITRAL secretariat that is involved in providing technical assistance to national bodies with the formulation and implementation of legal reforms in the field of international trade law, including in the area of public procurement. The Commission may therefore wish to call for closer coordination and cooperation between the Joint Venture and the UNCITRAL secretariat, and to that end suggest that the involvement of the UNCITRAL secretariat in the work of the Joint Venture would be highly desirable.

2. Other harmonization efforts

55. Pursuant to the 2003 Rome Declaration on Harmonization[41] and the Paris Declaration, a number of multilateral donors have also been engaged in the efforts to harmonize their policies, procedures and guidance tools used in the context of aid delivery.[42] Such efforts have been undertaken, for instance, in UNCTAD, in particular through its joint centre with WTO (ITC) and UNDG,[43] as well as by MDBs.[44]

56. Apart from what has been described elsewhere in this note (see in particular section A.2), the MDBs' joint procurement policies harmonization efforts include regular meetings of the Heads of Procurement for the MDBs.[45] The harmonization of tender documents, guidelines and what is mutually considered to be best practice is one of the key activities undertaken by this group. The most recently prepared set of standard procurement documents and user's guide, dated May 2005, contain standard bidding documents and user's guide for procurement of works.[46]

3. Relevance to the work of the Working Group

57. The international procurement benchmarks and standards proposed by the World Bank-OECD/DAC Roundtable have been brought to the attention of the Working Group when and as they are relevant to its work, and the UNCITRAL secretariat intends to continue doing so taking into account modifications proposed to these benchmarks and standards within the framework of the Joint Venture (see paras. 50 to 54 above).

58. In addition, at its sessions, the Working Group is regularly informed by representatives of development institutions of local procurement practices and issues arising on the ground in the application of procurement rules and procedures, including the Model Law, in the context of aid delivery. Mainly through the initiative of such development institutions, the subject of participation of local communities in public procurement has been included on the agenda of the Working Group. During its consideration of e-GP issues, the Working Group has also benefited from the contributions made by development institutions on the issues of access to procurement by SMEs and on cross-border procurement issues, which allowed the Working Group to address these issues in proposed revisions to the Model Law and the Guide.

59. The Commission may wish to express its appreciation to all institutions that have supported the work of the Working Group and emphasise the importance of continued and enhanced support for the work of the Working Group by a wide range of international, regional and sub-regional development institutions with expertise in the implementation of procurement reforms on the ground. The Commission may wish to invite all international organizations concerned to actively use the Working Group's forum for addressing difficulties encountered on the ground with the implementation of existing procurement standards and to bring to the attention of the Working Group emerging issues in the procurement field. Apart from the benefits of the shared practical knowledge and expertise, this will also contribute to harmonization of legal norms in the procurement field by disseminating information on the Model Law and the current work of the Working Group on its revision to a broader audience.

Notes

[1] The "legislative work" summarized in the present note covers, in addition to rule-formulating activities, preparation of any non-binding documents, such as guidelines and explanatory notes, in the areas of public procurement within the scope of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services. Consequently, legislative work of some organizations reviewed in the areas explicitly excluded from or not intended to be covered by application of the Model Law, such as defence procurement (see art. 1 (2) of the Model Law), public work concessions, public-private partnerships and privately-financed infrastructure projects, were not included in the summary of the present note. (For the legislative activities in these areas, see, in particular, in the EC procurement-related website, http://europa.eu.int/comm/internal_market/publicprocurement/dpp_en.htm and http://europa.eu.int/comm/internal_market/publicprocurement/ppp_en.htm). Also excluded from the scope of the present note are recently concluded or being negotiated bilateral and regional free trade agreements, which, although touch upon procurement-related issues covered by the Model Law, are concluded by individual countries or bloc of countries and thus fall outside the framework of legislative activities of any particular international organization.

[2] As regards a third area, transparency in government procurement, the working group of all WTO members addressing transparency in government procurement has discontinued its work. See the General Council's decision on the Doha Agenda work programme (the "July package", at http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm), of 1 August 2004, stating inter alia that there be no negotiation on the Singapore issue of transparency in government procurement.

[3] See "Annual report of the Working Party on GATS rules to the Council for Trade in Services", 2005, para. 5, at http://www.wto.org/english/tratop_e/gproc_e/gpserv_e.htm.

[4] The Secretariat understands that the proposed revisions may address, among other matters, framework agreements and electronic procurement techniques, such as electronic reverse auctions.

[5] See "Report of the Committee on Government Procurement (December 2004-October 2005)", paras. 19-23, at http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

[6] Available at the joint e-GP portal http://www.mdb-egp.org/.

[7] According to the introductory part of the E-Tendering Requirements.

[8] These papers, issued under the series of "Strategic Electronic Government Procurement", include "Introduction for Executives," "Standards framework" and "Roadmap" (all dated March 2004), "Strategic Planning Guide" (June 2004) and "Readiness Self-Assessment" (as reviewed in November 2004). These and other documents can be accessed through the e-GP Tool Kit at http://www.mdb-egp.org/data/default.asp.

[9] See the Report of Working Group I (Procurement) on the work of its seventh session (A/CN.9/575), para. 34.

[10] Ibid., para. 54.

[11] A centralized regional website http://simba.comesa.int:90/cpis/, for collecting and disseminating procurement information in the COMESA member States.

[12] The Directive was adopted by the COMESA Authority of Heads of States and Governments at its eighth summit at Khartoum in March 2003. It inter alia recommends the UNCITRAL Model Law as the model for local procurement law reforms in the COMESA member States.

[13] The guidelines, available at the UNCITRAL secretariat, contain essential components of national legal framework and institutional and organizational arrangements necessary to implement the Directive.

[14] Developed by the COMESA secretariat pursuant to the decision taken at the seventeenth meeting of the COMESA Council of Ministers (Kampala, 4-5 June 2004).

[15] The EPRCP entails deepening the harmonization of pubic procurement laws, regulations, procedures and practices in COMESA with a view to achieve total compliance of COMESA member States' procurement laws and regulations with the COMESA public procurement Directive; improving local procurement systems; strengthening the local capacities of COMESA member States in public procurement; and encouraging full utilization of the CPIS.

[16] The Working Group's sessions have been chaired by the COMESA Legal Director since 2004.

[17] The Group was established in 1995 as a sub-forum of the APEC Committee on Trade and Investment.

[18] Available at http://www.apecsec.org.sg/apec/apec_groups/committees/committee_on_trade/government_procurement.html.

[19] See section I of the "APEC Leaders' Statement to Implement APEC Transparency Standards", 16th APEC Ministerial Meeting (Santiago, Chile, 17-18 November 2004), document 2004/AMM/028, available at http://www.apecsec.org.sg/apec/apec_groups/committees/committee_on_trade/government_procurement.html.

[20] Available at http://www.adb.org/Documents/Guidelines/Procurement/guidelines-April-2006.pdf and http://www.adb.org/Documents/Guidelines/Consulting/consultant-guidelines-April-2006.pdf, respectively.

[21] Annex XX to Directive 2004/17/EC and Annex VIII to Directive 2004/18/EC.

[22] The new forms are available online in a structured XML format at the SIMAP website: http://simap.eu.int/.

[23] IP/05/1248 of 11 October 2005.

[24] See "Action Plan for the implementation of the legal framework for electronic public procurement", of 13 December 2004, available at http://europa.eu.int/comm/internal_market/publicprocurement/docs/eprocurement/actionplan/actionplan_en.pdf.

[25] See articles 36 (3) and 38 (5) of Directive 2004/18/EC and articles 44(3) and 45(3) of Directive 2004/17/EC.

[26] Available at http://europa.eu.int/comm/internal_market/publicprocurement/e-procurement_en.htm.

[27] Analysed in detail in document A/CN.9/WG.I/WP.44 and Add.1, submitted to Working Group I (Procurement) at its ninth session (New York, 24-28 April 2006).

[28] All documents are available at http://europa.eu.int/comm/internal_market/publicprocurement/index_en.htm.

[29] The CPV is the EU-wide single classification system for public procurement contracts, established by Regulation (EC) No. 2151/2003 to standardise the references used by contracting authorities and entities to describe the subject matter of their contracts. For the current CPV and its proposed draft version under consultation for updating, see http://europa.eu.int/yourvoice/ipm/forms/dispatch?form=cpv&lang=en.

[30] General Assembly resolution 58/4, annex.

[31] See ibid, para. 8.

[32] See, for example, para. 29 above on the revision of the APEC NBPs. ADB as well has been revising its policies to improve the effectiveness of their development activities in countries of their operation, especially as regards the promotion of transparency, accountability and anti-corruption measures.

[33] For example, see the activities of the Transparency International in public procurement http://www.transparency.org.uk/pcoat.htm. In the focus of their procurement-related work are areas prone to corruption, such as defence procurement, construction projects and aid delivery. Within its auspices, a series of documents and guidelines related to procurement have been prepared, for example "Preventing corruption on construction projects: Risk assessment and proposed actions for banks, export credit agencies, guarantors and insurers" of March 2005. It also works on the topics of debarment, local government procurement and the right to access to information.

[34] See the Report of Working Group I (Procurement) on the work of its sixth session (A/CN.9/568), para. 11.

[35] See http://www.aidharmonization.org/.

[36] See the procurement related indicators of the Paris Declaration: 2b – the establishment of reliable country procurement systems, and 5b—the use by donors of these country systems.

[37] Recipient countries and donors have jointly committed to use mutually agreed standards and processes to carry out diagnostics of the state of country procurement systems in recipient countries and identification of measures for effective performance of public procurement systems, develop sustainable reforms and monitor implementation.

[38] See DAC Guidelines and Reference Series—Harmonizing Donor Practices for Effective Aid delivery, Volume 3, "Strengthening Procurement Capacities in Developing Countries," OECD/DAC Roundtable on Procurement. Available at http://www.oecd.org/dataoecd/12/14/34336126.pdf.

[39] The revised version of the work plan as of 26 January 2006 is available at http://www.oecd.org/dataoecd/15/6/36233324.pdf.

[40] In the draft guide, the BLIs are grouped into the following pillars: legal and regulatory framework, institutional framework and management capacity, procurement operations and market practices, and integrity and transparency of the public procurement system. As regards each sub-indicator, the key aspect or a standard to be met is highlighted and a set of four scenarios describing four degrees of compliance with the standard is set. Associated with each scenario is a score from 3 to 0. By using an appropriate scoring system to aggregate scores for sub-indicators a score for the indicator is achieved. Under S1 scoring system, applied to interdependent sub-indicators, a failure to meet one sub-indicator results in failure of the entire indicator and score for the entire indicator is the lowest of the sub-indicators. Under S2 scoring system, applied when sub-indicators are independent from each other, scored are averaged and rounded to the next whole number. The two annexes to the draft guide provide for good practice provisions for national competitive bidding (Annex 1) and suggested minimum content of the bidding documents (Annex 2).

[41] Available at http://www1.worldbank.org/harmonization/romehlf/Documents/RomeDeclaration.pdf.

[42] Under the Paris Declaration, donors have committed to progressively rely on partner country systems for procurement when the country has implemented mutually agreed standards and processes, and to adopt harmonised approaches when national systems do not meet mutually agreed levels of performance or donors do not use them.

[43] See, for example, the joint manual of IMF, ITC, UNCTAD, UNDP, the World Bank and the WTO, entitled "Integrated framework (IF) for trade-related technical assistance for least developed countries," document UNCTAD/LDC/2005/2, of 1 July 2005.

[44] See, for example, para. 23 above on the revision of the AfDB procurement rules.

[45] The most recent annual meeting was held from 13 to 16 February 2006 in Manila, the Philippines.

[46] The earlier sets, dated May 2004, contained standard: requests for proposals (selection of consultants) (including forms and sample contracts); prequalification documents and user's guide for procurement of civil works; bidding documents for procurement of goods (as revised in May 2005); and bidding documents for procurement of works (smaller contracts). All available at the World Bank website.